Durham School Services, LP *and* International Brotherhood of Teamsters, Local 991. Case 15–RC–096096

May 9, 2014

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, AND SCHIFFER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on February 22, 2013, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 112 for and 74 against the Petitioner, with 4 nondeterminative challenged ballots. The Board has reviewed the record in light of the exceptions and briefs, and has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.[1]

The Employer filed several objections to the election, and now excepts to the Regional Director's decision to overrule its objections without a hearing. "The burden is on the objecting party to present evidence that raises substantial and material factual issues" under controlling law, i.e., to "establish[ ] a prima facie case in support of its objections." *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992), citing Board's Rules and Regulations, Section 102.69. We conclude that the Regional Director did not err here. Below we briefly explain our reasons for affirming the Regional Director's decision as to two of the Employer's objections.

I.

The Employer's Objection 1 alleged that the Union deceived voters by distributing a campaign flyer that contained pictures of eligible voters and statements misrepresenting their intent to vote for the Union. The Regional Director overruled this objection, finding that the Employer's evidence did not raise a substantial and material factual issue under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). We agree.

A.

In cases of alleged campaign misrepresentations, the Board applies the longstanding *Midland* standard under which it will not probe into the truth or falsity of the parties' campaign statements and will not set aside an election on the basis of misleading statements unless "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland*, 263 NLRB at 133. The *Midland* standard is premised on a "view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." Id. at 132, quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977). *Midland* adopts a "clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results" and "removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections . . . ." Id. The Eleventh Circuit affirmed the validity of the *Midland* rule shortly after its inception, and it has since become well established in the majority of courts of appeals.[2]

It is well established that the *Midland* standard applies where unions circulate campaign literature that identifies individual employees as union supporters, as well as attributing pro-union statements to them or representing that they intend to vote for the union. See, e.g., *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011); *BFI Waste Services,* 343 NLRB 254 (2004); *Champaign Residential Services*, 325 NLRB 687 (1998). As the Board has explained when uniformly rejecting election objections based on such literature, employees can "easily identify [it] as campaign propaganda." *Somerset Valley*, supra, 357 NLRB No. 71, slip op. at 1.[3] We have no difficulty in reaching the same conclusion in the present case.

[1] The Employer's motion to reopen the record is denied.

[2] *Certain-Teed Corp.*, 714 F.2d 1042, 1054–1055 (11th Cir. 1983), remanded to 271 NLRB 76 (1984) (to clarify retroactivity provision); see also *NLRB v. E. A. Sween Co.,* 640 F.3d 781, 784–785 (7th Cir. 2011); *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 963 (D.C. Cir. 2007); *NLRB v. Queensboro Steel Corp.*, 217 F.3d 839 (4th Cir. 2000); *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1438 (8th Cir. 1994); *St. Margaret Memorial Hospital v. NLRB*, 991 F.2d 1146, 1158 (3d Cir. 1993); *NLRB v. Best Products Co., Inc.,* 765 F.2d 903, 911–913 (9th Cir. 1985); *NLRB v. DPM of Kansas, Inc.,* 744 F.2d 83, 86 (10th Cir. 1984); *NLRB v. Semco Printing Center, Inc.,* 721 F.2d 886, 892 (2d Cir. 1983).

[3] In these cases, the Board also explained that it would have rejected the objections applying the broader *Van Dorn* rule of the Sixth Circuit, under which an election may be set aside "where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984). See *Somerset Valley*, supra, 357 NLRB No. 71, slip op. at 1–2; *BFI Waste*, supra, 343 NLRB at 254 fn. 2; *Champaign Residential*, supra, 325 NLRB at 687.

B.

The day before the election, the Union circulated a flyer, clearly identified as a union document, that included names and pictures of eligible voters, captioned by the statements: "On February 22, 2013 WE'RE VOTING YES For Teamsters Local Union 991! We are voting 'Teamsters YES!' for a better future at Durham!" The Employer's objection relies primarily on an affidavit of employee April Perez stating that she did not intend to vote for the Union and did not authorize the Union to attribute any quotation to her.

Perez admits, however, that she voluntarily signed, but claims not to have read, a document provided by the Union (entitled "Release Form," with a Teamsters logo and name) containing the following preprinted statement: "I hereby give permission to the International Brotherhood of Teamsters to use my likeness and name in Teamster publications." That document includes a preprinted statement reciting "I support forming a union with the Teamsters because . . . ," followed by, in handwriting, "I want fairness."[4] The record also contains two additional petitions (bearing the Teamsters logo and name at the bottom). Perez added her name to each, in a column containing the names of others, all under the preprinted statement, "Yes" (in 2-inch letters), then (in large font) "I'm voting to have a voice in our working standards at Durham by voting for Teamster representation on February 22."

On these facts, we agree with the Regional Director that the evidence fails to establish that the Union misrepresented the sentiments of Perez. The initial document bearing Perez' signature was a valid release to use her picture in campaign literature, and this document, standing alone, gave the Union sufficient reason to believe it had Perez' support. In addition, documentary evidence indicated that Perez added her name to two petitions containing other signatures, which proclaimed support for the Union. There is no basis to conclude, as a factual matter, that the Union engaged in any misrepresentation.

But, even assuming, as the Employer claims, that Perez did not in fact support the Union and did not write "I want fairness" on the initial document, we would still affirm the Regional Director's decision to overrule Objection 1 without a hearing, under the *Midland* standard. There is no claim (much less evidence) of forgery here. Nor is there any dispute that the Union's flyer was easily recognizable as campaign propaganda. At most, then, the Employer's evidence suggests a possible misrepresentation of an employee's sentiments which, under *Midland*, provides no basis for setting aside the election. Thus, there was no need for a hearing much less grounds to warrant setting aside the election, which we note the Union won by a considerable margin.[5] We would reach the same result even applying the Sixth Circuit's *Van Dorn* standard, see fn. 2, supra: the Union engaged in no "pervasive" misrepresentation or "artful" deception of employees.

C.

Our dissenting colleague proposes that the Board adopt an entirely new rule to apply in cases like this one, by holding that "a party engages in objectionable conduct when it publicizes how specific, named employees intend to vote unless the party obtained express consent from those employees to disclose how they intended to vote." Neither rationale offered for this new rule persuades us to depart from established law.[6]

First, our colleague—citing prior dissenting opinions—contends that campaign flyers that *misrepresent* employee sentiment "may improperly affect an election." This contention, of course, runs squarely against the time-tested premise of the *Midland* rule: that employees can recognize campaign propaganda for what it is.

Second, our colleague insists that *accurately* revealing an employee's expressed voting intentions, absent the employee's express consent, violates the principle of ballot secrecy. That claim is mistaken. If ballot secrecy were genuinely implicated, then even an employee's express consent to disclose her voting intentions would be insufficient to authorize publication of an employee's intended vote.[7] More significantly, whatever an em-

[4] In a supplemental affidavit that the Employer seeks to add to the record, Perez claims she did not complete the "I support forming a union with the Teamsters because" statement, but admits that, when asked at the time what she would want from a union, she responded, "to see fairness."

[5] *Park Chevrolet-Geo, supra,* 308 NLRB at 1010 fn. 1; *River Walk Manor, Inc.*, 269 NLRB 831, 831 (1984), later proceeding 281 NLRB 199 (1986), enf. denied mem. 833 F.2d 310 (4th Cir. 1987).

[6] We do not understand our colleague to argue that the Board's current approach is foreclosed by the Act, which does not speak directly to the issue posed here. As the Supreme Court has explained, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 328 (1946).

[7] Board law is clear that the secret ballot is a "matter of public concern, rather than a personal privilege subject to waiver by the individual voter." *J. Brenner & Sons, Inc.*, 154 NLRB 656, 659 fn. 4 (1965). By his own standard, the rule proposed by our colleague would itself damage ballot secrecy more than current law does. It contemplates that employees would certify their intended votes in writing and that this information would ultimately be revealed to the employer, upon its objection to the election. In addition to this public disclosure, such an authorization requirement would serve to cloak with authority represen-

ployee may tell a union about how she *intends* to vote, and however a union may publicize that disclosure, the fact remains that the employee's actual vote will *be* secret. See *Somerset Valley*, supra, 357 NLRB No. 71, slip op. at 2 fn. 5 (citing ballot secrecy in rejecting argument that employees whose names and pictures appeared in flyer would feel compelled to support union). The Board has consistently focused on protecting ballot secrecy during the voting process.[8] When the employee enters the voting booth, whether she votes against the union—either because she changed her mind or because she misled the union originally—or for the union, her vote is known only to her. There is no basis, then, for imposing precisely the sort of restriction on free campaign speech that the *Midland* Board rejected.

II.

The Employer's Objection 2 alleged that the Board agent handling the election compromised the integrity of the election in various ways when the agent carried the election booth and the ballot box to the Employer's parking lot in order to permit a disabled employee to cast a ballot. In overruling this objection, the Regional Director stated at the beginning of her analysis that the applicable standard is "whether the misconduct, taken as a whole, warrants a new election because it has 'the tendency to interfere with employees' freedom of choice' and 'could well have affected the outcome of the election.'" As the Employer argues, that standard applies to alleged *party* misconduct. Where conduct is attributable to a Board agent, the question is whether "the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F. 2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970); see also *Physicians & Surgeons Ambulance Service,* 356 NLRB No. 42, slip op. at 1 (2012), enfd. 477 Fed.Appx. 743 (D.C. Cir. 2012). Nevertheless, we find that the Regional Director actually applied this correct standard in her thorough analysis of the Employer's evidence on this objection, and we agree with her conclusion that no hearing was necessary. Accordingly, we affirm her dismissal of Objection 2.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Local 991, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time school bus drivers and monitors employed by the Employer at its Milton, Pace, and Navarre, Florida, facilities; excluding all office clerical employees, maintenance employees, mechanics, dispatchers, routers, the safety coordinator, managerial employees, professional employees, guards, and supervisors as defined by the Act.

Dated, Washington, D.C. May 9, 2014

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, a union flyer reproduced the pictures of employees with a statement proclaiming their intention to vote for the Union. Among the pictured employees was April Perez. The Employer has submitted affidavits from Perez stating that she did not plan to vote for the Union and did not authorize the Union to publicize her vote.

My colleagues adopt the Regional Director's report, which overruled, without a hearing, the Employer's objection seeking to have the election set aside because of the union flyer. I would reverse and remand this matter for a hearing on whether Ms. Perez and other employees expressly consented to the public disclosure of how they intended to vote. The Board goes to great lengths to protect the secrecy of ballots cast in a representation election. When, as here, a union has publicized employees' intended votes, the Board has applied a standard where legality turned on whether the union resorted to forgery or pervasive misrepresentation. See, e.g., *Somerset Val-*

tations in campaign literature that might otherwise be viewed with skepticism.

[8] See, e.g., *Physicians & Surgeons Ambulance Service,* 356 NLRB No. 42, slip op. at 1 (2012), enfd. 477 Fed.Appx. 743 (D.C. Cir. 2012); *St. Vincent Hospital*, LLC, 344 NLRB 586, 587 (2005); *Avante at Boca Raton, Inc.*, 323 NLRB 555, 557–558 (1997); *Braeburn Nursing Home, Inc.*, 290 NLRB 268 fn. 2 (1988).

ley Rehabilitation & Nursing Center, 357 NLRB No. 71 (2011). I would apply a different standard, under which it would be objectionable for a union to disclose employees' intended votes without their express consent. Thus, I would remand this case for a hearing to determine whether Perez and others authorized the Union to reveal their intended votes.[1]

The election in this case was held on February 22, 2013. The day before the election, the Union distributed a flyer picturing 80 to 85 employees, including Perez, under the heading "WE'RE VOTING YES" for the Union. The Employer offered two affidavits from Perez.[2] In her first affidavit, Perez stated that she consented to have her picture taken by a union representative and signed a form; she did not plan to vote for the Union; she never told any union representative that she was going to vote "yes"; she was not informed that her face would be put on a flyer saying that she was going to vote "yes"; and she had no intention of publicizing how she was going to vote.[3]

Overruling Objection 1, the Regional Director applied the test set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), which provides that an election may be set aside on the basis of misrepresentations in campaign propaganda only where a party resorts to forgery that "renders the voters unable to recognize the propaganda for what it is." Id. at 130 (internal quotations omitted). The *Midland* test and the related standard set forth in *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), cert. denied 469 U.S. 1208 (1985),[4] only address one aspect of what makes flyers such as the one at issue here potentially objectionable. It is true that a "we're voting yes" flyer that misrepresents employees' views may improperly affect an election.[5] But a flyer that *accurately* discloses employees' intended votes without their consent is just as objectionable as one that misrepresents their votes. To its credit, the Board has a long history of zealously protecting ballot secrecy.[6] If any party pulls aside the curtain to publicize how specific, identified employees intend to vote, the Board should ask more than whether the publicity constituted a forgery or pervasive misrepresentation.

Accordingly, I would hold that a party engages in objectionable conduct when it publicizes how specific, named employees intend to vote unless the party obtained express consent from those employees to disclose how they intended to vote.[7] I would remand this case for a hearing on Objection 1 to be governed by that standard, at which evidence may be introduced concerning whether the requisite consent had been obtained from Perez and the other employees whose voting intentions were disclosed by the Union.

In my opinion, this is a common-sense standard. It is also consistent with secret balloting in Board-conducted elections that has been so highly valued by all parties

[1] I join my colleagues in adopting the Regional Director's recommendation to overrule the Employer's remaining objections. In doing so, I do not rely on *Physicians & Surgeons Ambulance Service,* 356 NLRB No. 42 (2012).

[2] Perez' second affidavit was prepared after the Regional Director issued her report. My colleagues deny the Employer's motion to reopen the record to accept Perez' supplemental affidavit. I disagree, but I would remand for a hearing on the basis of the first affidavit alone.

[3] The Union provided the Region with a form that Perez apparently signed. The form is divided into upper and lower sections by two solid black lines. Above the double lines appears the statement, "I hereby give permission to the International Brotherhood of Teamsters to use my likeness and name in Teamster publications." Perez' signature appears immediately underneath this statement. Below the double lines is the preprinted statement: "I support forming a union with the Teamsters because," followed by the handwritten words "I want fairness!"

On its face, the form authorizes the Union to use Perez' likeness and name in union publications, and it appears to state that Perez "support[s] forming a union with the Teamsters." (In her supplemental affidavit, Perez states that the union representative holding the form asked her what she would want to see changed *if* the Union were voted in, and Perez replied she would want to see fairness.) However, the form does not indicate that Perez authorized the Union to use her likeness and name to advertise her intended vote. Indeed, with its double lines dividing the upper and lower sections, the form separates the authorization from the statement of support.

[4] Under the Sixth Circuit's test, an election may be set aside "where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." *Van Dorn Plastic*, 736 F.2d at 348.

[5] Such a flyer may deceptively induce other employees to support the union or, by exaggerating the extent of union support, deceptively persuade union opponents to refrain from voting. See *Somerset Valley Rehabilitation*, 357 NLRB No. 71, slip op. at 3 (Member Hayes, dissenting); *BFI Waste Services*, 343 NLRB 254, 254 (Member Meisburg, concurring); *NLRB v. Gormac Custom Mfg., Inc,* 190 F.3d 742, 749 (6th Cir. 1999).

[6] See, e.g., *Northwest Packing Co.*, 65 NLRB 890, 891 (1946) ("The secrecy of the ballot is essential in a Board-conducted election, and it may not be jeopardized."); *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911, 913 (1957) (setting aside election results where "the improvised voting arrangements were entirely too open and too subject to observation to insure secrecy of the ballot"); *Fessler & Bowman, Inc.*, 341 NLRB 932, 934 (2004) (stating that "the secrecy of balloting . . . is a hallmark of our election procedures," and holding that it is objectionable conduct "where a party collects or otherwise handles voters' mail ballots").

[7] The Union submitted copies of prounion petitions bearing what appears to be Perez' signature. In her supplemental affidavit, Perez states that she does not recall signing these petitions, and that no one has shown her these documents or asked her to validate or dispute her signature. Contrary to my colleagues, I believe that whether Perez did in fact sign the undated, unauthenticated petitions is an issue for the hearing; but even if she did, a further issue remains whether she consented to the disclosure of her voting intentions in the Union's flyer. Nothing on the face of those petitions indicates this type of express consent.

throughout the Act's history. I respect my colleagues' desire to avoid intruding on "free campaign speech" and to refrain from adopting what they characterize as "an entirely new rule." However, I believe the Act warrants a finding that the unauthorized disclosure of an employee's voting intention goes beyond "free campaign speech." Even if employees generally "recognize campaign propaganda for what it is" (as reflected in the Board's *Midland* rule), the unauthorized disclosure of an employee's voting intention should be objectionable because such a disclosure directly undermines the hallmark characteristic of Board-conducted secret ballot elections.[8]

For this reason, as to this issue, I respectfully dissent.

Dated, Washington, D.C. May 9, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[8] My colleagues undertake the unenviable task of defending the unauthorized disclosure of an employee's voting intention both when this is done "accurately" *and* when it occurs in campaign flyers that "misrepresent" how an employee intends to vote. Notwithstanding my colleagues' suggestion to the contrary, my standard would not require anybody to "certify their intended votes in writing." Nor would the damage inflicted by unauthorized disclosures of an employee's voting intention be eliminated by preserving secrecy in the actual election, because this argument fails to recognize that the point of a "secret ballot" election is to preserve "secrecy" regarding how people will vote. The *advance* disclosure of an employee's voting intention, without authorization, defeats the very purpose of conducting an election by "secret ballot." In my view, the possibility that some employees may later change their actual vote renders worse, not better, the unauthorized disclosure of an employee's voting intention before the election.